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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. ~~976~~ 41

THE CHOCTAW NATION and THE CHICKASAW NATION,
Petitioners,

VERSUS

STATE OF OKLAHOMA, ET AL.,
Respondents.

No. ~~1104~~ 59

THE CHEROKEE NATION OF TRIBE OF INDIANS IN OKLAHOMA,
Petitioner,

VERSUS

STATE OF OKLAHOMA, ET AL.,
Respondents.

THE BRIEF OF THE CHOCTAW AND CHICKASAW NATIONS

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THE BRIEF OF THE CHOCTAW AND CHICKASAW NATIONS

This is an appeal by the Choctaw and Chickasaw Nations from the judgment of the United States Court of Appeals for the Tenth Circuit entered on the 31st day of October, 1968, in cases numbered 9924 and 9925 in that court, and which is reported at 402 F.2d 739.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit in each of these cases was entered on the 31st day of October, 1968. Certiorari was granted on April 21, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

TREATIES AND ACTS OF CONGRESS INVOLVED

This case involves the Treaty of Doak's Stand in 1820 (7 Stat. 210, Proc., Jan. 8, 1921), the Treaty of Washington (7 Stat. 234, Proc., Feb. 19, 1825), the Indian Removal Act of May 28, 1830 (U. S. Statutes at Large, IX, 411-12), the Treaty at Dancing Rabbit Creek, September 27, 1830 (7 Stat. 333, Proc., Feb. 24, 1831).

QUESTIONS PRESENTED FOR REVIEW

Was the cession of lands west of the Mississippi to the Choctaws by the Treaties of 1820 and 1830 a purpose appropriate to the objects for which the United States held the territory?

When the Treaties of 1820 and 1830 were entered into, was it understood between the United States and the Choctaws that the area ceded to the Choctaws was to be embraced within a future state?

Is *U. S.* v. *Holt State Bank,* 270 U.S. 49, a relevant precedent?

Are the guidelines for the construction of the Treaty of Doak's Stand in 1820 and the Treaty at Dancing Rabbit

Creek in 1830 to be found in *Northern Pacific Railway Company* v. *Soderberg*, 188 U.S. 526, and *Caldwell* v. *United States*, 250 U.S. 14, or in *Choctaw Nation* v. *United States*, 119 U.S. 1; *Jones* v. *Meehan*, 117 U.S. 1, and *Choctaw Nation of Indians* v. *United States*, 318 U.S. 423?

Did the Atoka Agreement of April 23, 1897 (30 Stat. 506), or the Act of June 28, 1898, commonly called the Curtis Act (30 Stat. 495), effect a retrocession of the bed of the nevigable portion of the Arkansas River to the United States?

STATEMENT OF THE CASE

This case involves the ownership of the avulsed beds and the oil and minerals underlying the navigable portion of the Arkansas River in Oklahoma.

The State of Oklahoma claims to own all the bed of the navigable portion of the Arkansas River within Oklahoma. The Choctaw and Chickasaw Nations also claim to own all of the bed of the navigable portion of the Arkansas River from its confluence with the Canadian River to the eastern boundary of Oklahoma. The Cherokee Nation contends that the thread of the river is the boundary between the Cherokee Nation to the north and the Choctaw Nation to the south, and claims to own the bed of the navigable portion of the Arkansas River lying in the interior of the Cherokee Nation.

This action arose after the State of Oklahoma had leased a sizeable part of the bed of the navigable portion of the Arkansas River within Oklahoma to several oil companies.

The action was commenced in the United States District Court for the Eastern District of Oklahoma by the Cherokee Nation against the State of Oklahoma, the several oil companies and one sand and gravel company, who claimed as lessees of the State of Oklahoma (A 5a, 105a). The Choctaw and Chickasaw Nations intervened. The State of Oklahoma answered and counter-claimed (A 91a). So did the oil companies and the sand and gravel company. The trial court entered judgment on the pleadings in favor of the State of Oklahoma and against the Choctaw and Chickasaw Nations and the Cherokee Nation. An appeal was taken to the United States Court of Appeals for the Tenth Circuit, which affirmed the judgment of the trial court (A 131a).

In their aboriginal state, the Choctaws, Chickasaws and Cherokees occupied large areas in the southern states. The explosive development of the cotton economy around the commencement of the nineteenth century brought great pressures by white planters upon the Federal Government to move the Indians out of the southern states. The Louisiana Purchase provided a reasonably accessible place to which the southern Indians were expected to be moved.[1]

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[1] Within a year after the Louisiana Purchase was made, Congress passed the Act of March 26, 1904, entitled "An Act erecting Louisiana into two territories and providing for the temporary government thereof." Section 15 of that Act provided that: "SEC. 15. The President of the United States is hereby authorized to stipulate with any Indian Tribes owning lands on the east side of the Mississippi, and residing thereon, for an exchange of lands, the property of the United States, on the west side of the Mississippi. . . ."

On August 23, 1830, Andrew Jackson, then President of the United States, was to say to the Chickasaws that they could only be preserved as a Nation by conseniing: ". . . to remove to a country beyond the

The Cherokees were the first of the southern tribes to yield to these pressures. By the Treaty of 1817 they gave up their lands in the southern states for a fee-simple title to lands in what is now Arkansas. Article V of that treaty recited that the lands ceded to the Cherokees ". . . is to commence on the north side of the Arkansas River, at the mouth of Point Remove or Budwell's Old Place; thence by a straight line northwardly to strike Chataunga mountain, or the hill first above Shield's Ferry on White River, running up and between said rivers for complement, the banks of which rivers to be the lines . . ."[2]

Before the Choctaws had time to enter in possession of their new territory it was discovered that the land ceded to them in Arkansas was already occupied by white settlers. The Federal Government, realizing the difficulty of dislodging these white families, decided to induce the Choctaws to relinquish the land in Arkansas. In 1824 a delegation of Choctaws were invited to Washington to negotiate a treaty that would relocate the eastern boundary of the land ceded to them by the Treaty of 1820. On November 9, 1824, John C. Calhoun, the Secretary of War, addressed a letter to the Choctaw delegation then in Washington, in which he

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[1] (Continued)

Mississippi, which for the happiness of our red friends, was laid out by the Government a long time since, and to which it was expected, ere this, they would have gone." Senate Documents Indian Removals 23rd Congress 1st Session. Document 512 (Vol. II) Correspondence on the subject of the Emigration of Indians, between November 30, 1831, and December 27, 1833. (Washington: Printed by Duff Green 1835) No. 245, pp. 240, 241, 242.

[2] The Treaty at Cherokee Agency, July 8, 1817, 7 Stat. 156, Proclamation December 26, 1817.

said: *"There is no probability that any State or territory will be erected to the west of the Arkansas territory. . . ."*[3]

A treaty was entered into on January 20, 1825, in the City of Washington[4] by which the Choctaw Nation retroceded to the United States: ". . . all that portion of the land ceded to them by the second article of the Treaty of Doak's Stand, as aforesaid, lying east of a line beginning on the Arkansas, one hundred paces east of Fort Smith, and running thence due south to Red River; it being understood that this line shall constitute, and remain, the permanent boundary between the United States and the Choctaws; and the United States agreeing to remove such citizens as may be settled on the west side to the east side of said line, *and prevent future settlements from being made on the west thereof.*"

The emigration contemplated in the Treaty of 1820 was slow.[5]

In 1826, General William Clark, General Thomas Hinds, and General John Coffee, as Commissioners for the United States, held a council with the Choctaws in Florence, Alabama. In an address on November 11, 1826, they said to the Choctaws:

> "The United States have a large unsettled and unappropriated land on the west side of the great river

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[3] American State Papers, Indian Affairs, Vol. II, pp. 549-551.

[4] 7 Stat. 234, Proclamation, February 19, 1825.

[5] By 1829 about 150 Choctaws had been induced to settle in their new territory. Debo, *Rise and Fall of the Choctaw Republic,* at page 50.

Mississippi, *unto which they do not intend that their white settlers shall extend.*"[6]

On the 13th of November, the commissioners submitted for the consideration of the Choctaws the terms upon which they were authorized to propose a cession by the Choctaws of their remaining lands in the State of Mississippi. The commissioners brought to the attention of the Choctaws the object of their mission, saying:

> ". . . but if you are satisfied that under such condition of things you cannot be happy, consent to move beyond the Mississippi, where you will be away from the white people and from their laws, and be able to live under your own.
>
> * * * * * * *
>
> ". . . and your white father can bring you forth; and can keep the white mans laws from interrupting and disturbing you; and there I will guard you against all enemies, whether they be white or red; *and no State or Territory will be created.*"[7]

But, the people of Mississippi did not wait for the success of these Federal schemes for the removal of the Choctaws. In 1829, the Legislature provided for the extension of State laws over Choctaw and Chickasaw land adjacent to organized counties. And on January 19, 1830, Tribal governments were abolished under penalty of fine and imprisonment to any Indian who should exercise the "office of Chief,

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[6] American State Papers, Indian Affairs, Vol. II, page 711.

[7] Senate Document 512, Vol. II, pages 255-258.

Mingo, Head Man, or other post or power established by the Tribal Statutes, ordinances or customs of the Indians."[8]

On May 28, 1830, Congress passed an act which provided:[9]

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* that it shall and may be lawful for the President of the United States to cause so much of any territory belonging to the United States, west of the river Mississippi, not included in any state or organized territory, and to which the Indian title has been extinguished, as he may judge necessary, to be divided into a suitable number of districts, for the reception of such tribes or nations of Indians as may choose to exchange the lands where they now reside, and remove there; and to cause each of said districts to be so described by natural or artificial marks, as to be easily distinguished from every other.
>
> * * * * * * *
>
> Sec. 3. *"And be it further enacted,* that in making of any such exchange or exchanges, *it shall and may be lawful for the President solemnly to assure the tribe*

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[8] Laws of Colonial State Governments relating to Indians and Indian Affairs from 1633 to 1831, inclusive (Washington 1832), pp. 242-243, see also Niles Register XXXVIII (1830) 73.

On February 22, 1873, the Committee of Indian Affairs in a report to the House of Representatives of the Third Session of the 42nd Congress in reviewing these events said: "The course adopted by the State of Mississippi was necessarily compelling a conflict of authority between the United States and the State of Mississippi, or else an abandonment by the United States of its former treaty-stipulations with the Choctaws, and a gross violation of its agreements with them, by which it had received of the Choctaws vast tracts of country in said States of Mississippi and Alabama."

[9] Commonly called "The Removal Act"; U.S. Statutes at Large IX 411-12.

or nation with which the exchange is made; that the United States will forever secure and guarantee to them, and their heirs or successors, the country so exchanged with them, and, if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same."

Shortly after Andrew Jackson took office as President, Georgia tore up Federal treaties and annexed the territory of the Cherokee and Creek Nations; Mississippi and Alabama did likewise in the case of the Choctaws and Chickasaws. The answer of the Cherokees was to engage William Wirt of Baltimore, formerly Attorney General and an eminent constitutional lawyer, to take their case into court on the issue denying a state's right to annul a Federal contract. As no state possessed this right, the outcome of any suit, once it should reach the Supreme Court, seemed a foregone conclusion.[10]

Andrew Jackson, fearing the outcome of *Cherokee Nation* v. *Georgia,* and never being one to assume a posture of meekness toward the courts (particularly where Chief Justice John Marshall was concerned), directed his Secretary of War, John H. Eaton, to arrange a meeting with the Choctaws and Chickasaws at Franklin, Tennessee, for August 23, 1830. So on June 1st, four days after the passage of the Removal Act, Secretary Eaton wrote the Chickasaws and the Choctaws inviting them to meet with him and the President at Franklin, Tennessee. He professed the benevolent purpose of the Government to remove them from the hostile jurisdiction of Mississippi saying:[11] "Congress has

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[10] *Cherokee Nation* v. *Georgia,* 5 Pet. 1.

[11] Senate Document 23d Congress, 1st Session, 512 II, 3).

passed a law manifesting a desire that you should remove and have liberally prepared the means for taking care of you."

Commenting on the remarkable circumstances of the President of the United States journeying to an Indian Council Ground for the purpose of making a treaty, Marquis James said in his Pulitzer Prize winning biography of Jackson: [12] "General Jackson traveled westward to cut the ground from under the courts by persuading as many Indians as possible to agree to emigrate before any suit should come up for adjudication. Of the Choctaws and Chickasaws he had strong hope . . ."

When Jackson reached the meeting place only the Chickasaws had appeared. His overtures to the Chickasaws were characteristic of the advances his commissioners were to make to the Choctaws the following month at Dancing Rabbit Creek. He deplored the inability of the Federal Government to protect the Indians from intrusions of the white settlers and the harrassments of governments of the southern states and recounted the desires of the Indians to live in peace and maintain their tribal existence. His placations confirmed the intention of the Government that the lands west of the Mississippi to which the southern Indians were proposed to be moved would never become a part of any State or Territory. Hear the suasions of Jackson: [13]

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[12] Andrew Jackson (Portrait of a President) by Marquis James, Vol. 2, at page 246.

[13] Senate Documents Indian Removals 23d Congress 1st Session. Document 512 (Vol. II) Correspondence on the subject of the Emigration of Indians, between November 30, 1831, and December 27, 1933. (Washington: Printed by Duff Green 1835) No. 245, pp. 240, 241, 242.

"Brothers, listen: The only plan by which this can be done, and tranquillity for your people obtained, is, that you pass across the Mississippi to a country in all respects equal, if not superior, to the one you have. *Your great father will give it to you for ever, that it may belong to you and your children while you shall exist as a nation, free from all interruption.*

* * * * * * *

"Peace invites you there, annoyance will be left behind; *within your limits, no State or Territorial authority will be permitted;* intruders, traders and above all, ardent spirits, so destructible to health and morals, will be kept from among you, only as the laws and ordinances of your nation may sanction their admission."

Marquis James recounts:[14] "The Indian dignitaries retired for consultation. General Jackson stepped into his carriage and drove away, leaving John Henry Eaton and General John Coffee to complete the negotiations. At the Hermitage he received word of the Chickasaws capitulation. They would cross the Mississippi in 1832. Meantime the Choctaws agreed to treat. Directing Eaton and Coffee to meet them, the President set out for Washington the first week in September."

Secretary Eaton and General Coffee proceeded from Franklin, Tennessee, to Dancing Rabbit Creek in Mississippi where they met with the Choctaws on September 15, 1830. On September 18th they exhorted the Choctaws:

"Brothers: hesitate not, determine what you mean to do on this important occasion; record the votes of your

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[14] Andrew Jackson (Portrait of a President) by Marquis James, Vol. 2, at page 248.

head-men, and let us know who amongst you are willing to remove and who are opposed. The sense of the nation will thus be correctly ascertained, and the question which has so much agitated you be finally put to rest: say it is your determination to remain, and the subject is done with—we shall then trouble you with our talks no more. But decide to remove, and liberal provisions will be made to carry you to a country where you can be happy, and where already your fathers and brothers have gone in peace to reside. It is a desirable region, double in extent to the one you occupy, and large and fertile enough for twice or three times the number of people you have. There your great father can be your friend; there he can keep the white man's laws from interrupting and disturbing you; and there, too, he will guard you against all enemies, whether they be white or red. *There no State or Territory will be created* and he will have it in his power to protect you fully in your usages, laws, and customs. Here he cannot do these things, because neither he nor Congress possess authority to prevent the States from extending their jurisdiction over you, and throughout their limits."[15]

A treaty was concluded on September 27th, and a supplement was adopted on September 28th.[16] It provided that "The United States under a grant specially to be made by the President of the United States shall cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River, *in fee simple* to them and their descendants, to inure to them while they shall exist as a

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[15] Senate Documents Indian Removals, 23d Congress, 1st Session, Document 512. American State Papers, Indian Affairs, Vol. II, pp. 256, 257, 258.

[16] Treaty at Dancing Rabbit Creek September 27, 1830, 7 Stat. 333, Proclamation February 24, 1831.

nation, and live on it, beginning near Fort Smith where the Arkansas boundary crosses the Arkansas River, running thence to the source of the Canadian Fork; *if in the limits of the United States,* or to those limits; thence due south to Red River, and down Red River to the west boundary of the Territory of Arkansas; thence north along that line to the beginning. The boundary of the same to be agreeable to the Treaty made and concluded at Washington City in the year 1825. The grant to be executed so soon as the present Treaty shall be ratified."

Article IV of the treaty provided that: "The Government and people of the United States are hereby obliged to secure to the said Choctaw Nation of Red People by jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation of Red People and their descendants; *and that no part of the land granted to them shall ever be embraced in any Territory or State; . . .*"[17]

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[17] The southern tribes were the Cherokees, Choctaws, Chickasaws, Creeks and Seminoles. Their removal from the southern states was a concerted action. They were all removed to lands in what became known as the Indian Territory and what is now the eastern and southern portions of Oklahoma. That country was intended as the permanent abiding place of such tribes, where as self-governing communities, they should be free to enjoy their own tribal laws and customs forever, free from the interference or encroachment of the whites. By the treaty with the Cherokees of May 6, 1828, the United States guaranteed that their permanent home west of the Mississippi "shall never, in all future time, be placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension in any way, of any of the limits of any existing Territory or State," and practically the same guarantee was reaffirmed in the treaty of December 29, 1835. And by the treaty with the Chickasaws of May 24, 1834, the Government consented to protect the tribes in this new home against any other tribe

For three-quarters of a century this guarantee was to be the Magna Charta of the national existence of the Choctaw Nation.

ARGUMENT

Before the American Revolution, the English Crown opened the beds of navigable waters. After the American Revolution, the thirteen states succeeded to the rights of the Crown. In accepting a new state into the Union the Federal Government relinquished to the new state the title which it had to the beds of the navigable streams within that state. But ". . . Congress has the power to make grants of lands below high water mark of navigable waters in any territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects of which the United States hold the territory."[18]

It is settled law in this country that ". . . where the United States, after acquiring the territory and before the

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[17] (Continued)
and from the whites, and agreed to keep them without the limits of any State or Territory. By Article 14 of the treaty of March 24, 1832, the Creeks were guaranteed "that no State or Territory should ever have a right to pass laws for the government of said Indians, but that they should be allowed to govern themselves, etc." And by joint treaty with the Creeks and Seminoles of August 7, 1856, it was provided that no State or Territory should ever pass laws for said tribes, and that no portion of their lands should ever be embraced or included in a State or Territory.

[18] *Shively* v. *Bowlby*, 152 U.S. 1, 48, 38 L.Ed. 331, 349.

creation of the state, has granted rights in such lands by way of performing international obligations, or effecting the use or improvement of the lands for the purposes of commerce among the states and with foreign nations, or carrying out other public purposes appropriate to the objects for which the territory was held, such rights are not cut off by the subsequent creation of the state, but remain unimpaired, and the rights which otherwise would pass to the state in virtue of its admission into the Union are restricted or qualified accordingly."[19]

Oklahoma contends that the United States never abandoned the intention eventually of including all whites and Indians who moved westward as citizens in one or more states; that the United States always retained the intention, the right and the power to include the lands conveyed to the Choctaws and Chickasaws in a future state, either through agreement with them or otherwise.[20]

Oklahoma also contends that the Arkansas River was only aluded to in the treaties and the patent to the Choctaws as a monument or a reference point.[21] Finally, as we read their brief in opposition to the Petition for Certiorari, Oklahoma contends that the Atoka Agreement of April 23, 1897 (30 Stat. 506), effected a retrocession of the bed of the

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[19] *United States* v. *Holt State Bank*, 270 U.S. 49, 55, 70 L.Ed. 465, 468.

[20] It states this as its proposition and argues it *in extenso* at pages 25, *et seq.*, of the brief which it filed in this Court in opposition to the petition of the Choctaw and Chickasaw Nations for certiorari.

[21] At page 14 of its brief in opposition to the appellants' petition for certiorari, Oklahoma said: "What have Petitioners to offer to show this public highway of commerce was conveyed to them? Mere references to the Arkansas River—obviously as a boundary, a monument or a reference point."

navigable streams within the land of the Choctaw Nation to the United States.[22]

Under the Constitution, the United States has the power to convey a fee-simple title to Indian Tribes.

Indian Tribes are capable of taking lands as owners in fee simple by purchase where the United States, for a valuable and adequate consideration, so sell such lands to them.[23]

In an opinion delivered by Mr. Justice Reed, in *Rynes* v. *Grimes Packing Company,* 337 U.S. 86, 103, 104, 93 L.Ed. 1231, 1247, the Court said:

> "Since Congress, under the Constitution, Section 3 of Article 4, has the power to dispose of the lands of the United States, it may convey to or recognize such rights in the Indians, *even a title equal to fee simple, as in its judgment is just.* Northwestern Band of Shoshone Indians v. United States, 324 U.S. 335, 339, 340, 89 L. ed 985, 990, 991, 65 Sup. Ct. 690." (Emphasis supplied.)

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[22] At the last paragraph, page 29, of its brief in opposition to petition for certiorari, Oklahoma says abstrusely: "Moreover, shortly before Oklahoma became a state, agreements were made by the United States with the Choctaws and Chickasaws and with the Cherokees for the relinquishment of tribal sovereignty and the allotment of the tribal lands in severalty and in fee to the tribal members and their freed slaves. This was tersely expressed in the opinion of the Court of Appeals as follows: "In 1893, Congress created a commission to negotiate with the Cherokees, the Choctaws, and other tribes for the extinguishment of the tribal titles to land, and the allotment of land to the individual members of the tribes. *The result was an agreement with the Cherokees and with the Choctaws which nullified treaties incon-*
(Continued on page 17)

[23] 42 C.J.S. 694, 27 Am. Jur. 566 and authorities cited thereat.

By the Treaty at Doak's Stand in 1820 and the Treaty at Dancing Rabbit Creek in 1830, the United States conveyed to the Choctaw Nation the fee-simple title to the lands west of the Mississippi situated in what is now Oklahoma.

By Article I of the Treaty concluded at Doak's Stand on April 18, 1820, the Choctaws ceded to the United States a part of the lands owned by them in Mississippi.[24] Article II of the Treaty provides:

> "For and in consideration of the foregoing cession on the part of the Choctaw Nation, and in part satisfaction for the same, the Commissioners of the United States on behalf of the United States, do hereby cede to said Nation, a tract of country west of the Mississippi River . . ."

On September 27, 1830, the United States entered another treaty with the Choctaws at Dancing Rabbit Creek[25] by which the Choctaws ceded to the United States the rest of the land they owned in Mississippi. The treaty provided for minor gifts to the Indians and by Article II the United States again conveyed to the Choctaw Nation the lands west of the Mississippi River situated in what is now Oklahoma:

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[22] (Continued)
sistent therewith and which provided for the allotment of the lands. These agreements were followed by the Act of April 26, 1906, 34 Stat. L. 137, which provided for final disposition of the affairs of the Five Civilized Tribes. This Act required that lands belonging to the tribes on their dissolution shall be held by the United States in trust for the use and benefit of the Indians." (Emphasis appeared in Oklahoma's brief.)

[24] 7 Stat. 210.

[25] 7 Stat. 333.

". . . in fee simple, to them and to their descendants, to inure to them while they shall exist as a nation and live on it . . ."

Mr. Justice Holmes, speaking for the Court in *Fleming* v. *McCurtain*, 215 U.S. 56, 59, 54 L.Ed. 88, 91, said:

"We should mention, however, that the United States already had ceded this tract to the Choctaw Nation with no qualifying words by the Treaty of October 18, 1820 (Art. II, 7 Stat. at L. 210 Choctaw Nation v. United States, 119 U.S. 1, 38, 30 L. Ed. 306, 318, 7 Sup. Ct. Rep. 75. The Treaty of 1830 only varied the description a little and provided for a special patent."

The conveyance of the fee title to the lands in Oklahoma to the Choctaws by the Treaties of 1820 and 1830 and by the patent of 1842 and the removal of the Choctaws on to those lands were each "a public purpose appropriate to the objectives for which the United States held the Territory."

The desire of the Federal Government to move Indians out of the southern states is such a commonly-known fact that the Court may take judicial notice of it. It would be an unnecessary labor upon the Court to cite the endless historical writings on the subject. Sufficient to say, within a year after the Louisiana Purchase was made, Congress passed the Act of March 26, 1904, entitled "An Act erecting Louisiana into two territories and providing for the temporary government thereof." Section 15 of that Act provided that: "SEC. 15. The President of the United States is hereby authorized to stipulate with any Indian Tribes owning lands on the east side of the Mississippi, and residing thereon, for an exchange of lands, the property of the United States, on the west side of the Mississippi . . ."

On August 23, 1830, Andrew Jackson, then President of the United States, was to say to the Chickasaws that they could only be preserved as a Nation by consenting: ". . . to remove to a country beyond the Mississippi, which for the happiness of our red friends, was laid out by the Government a long time since, and to which it was expected, ere this, they would have gone."[26]

Generals Clark, Thomas, and Hinds, who, as commissioners of the United States negotiating for the removal of the Choctaws, said to them in an address at the Treaty Ground of the Choctaw Nation on November 11, 1826: "The United States have a large unsettled and unappropriated country on the west side of the great river Mississippi, into which they do not intend that their white settlers shall extend. This is the country in which our father the President intends to settle all of his Red children. * * * We shall now proceed to state the views which the General Government of the United States has at present in contemplation. It is the policy and interest of the Government to extinguish the Indian title to all the lands on this side of the Mississippi."[27]

For brevity it need only be added that the Indian Removal Act of 1830 making it lawful for the President of the United States to cause so much of any territory belonging to the United States west of the Mississippi River not

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[26] Senate Documents Indian Removals, 23d Congress, 1st Session. Document 512 (Vol. II) Correspondent on the subject of the Emigration of Indians, between November 30, 1831, and December 27, 1833. (Washington: Printed by Duff Green 1835) No. 245, pp. 240, 241, 242.

[27] American State Papers, Indian Affairs, Vol. II, page 741.

included in any state or organized territory and to which the Indian title had been extinguished, as he may judge necessary, to be divided into a suitable number of districts, for the reception of such tribes or Nations of Indians as he might choose to exchange the lands where they now reside and remove them there, clearly evinced a public purpose that was appropriate to the objects for which the United States held the territory.

Where Congress has granted lands underlying navigable waters by way of carrying out public purposes appropriate to the objects for which the territory was held, such rights are not cut off by the subsequent creation of a state but remain unimpaired, and the rights which otherwise would pass to the state by virtue of its admission to the Union are restricted or qualified accordingly.

This Court said in *Holt State Bank:*

> "It is settled law in this country that lands underlying navigable waters within a state belong to the state in its sovereign capacity and may be used and disposed of as it may elect, subject to the paramount power of Congress to control such waters for the purposes of navigation in commerce among the states and with foreign nations, and subject to the qualification that where the United States, after acquiring the territory and before the creation of the state, has granted rights in such lands by way of performing international obligations, or effecting the use or improvement of the lands for the purposes of commerce among the states and with foreign nations, or carrying out other public purposes appropriate to the objects for which the territory was held, such rights are not cut off by the subsequent creation of the state, but remain unimpaired, and the rights which otherwise would pass to the state in virtue of its admission into the Union are restricted

or qualified accordingly. Barney v. Keokuk, 94 U.S. 324, 338, 24 L.ed. 224, 228; Shively v. Bowlby, 152 U.S. 1, 47, 48, 57, 58, 38 L.ed. 331, 348, 349, 352, 14 Sup. Ct. Rep. 548; Scott v. Lattig, 227 U. S. 229, 242, 57 L.ed 490, 496, 44 L.R.A. (N.S.) 107, 33 Sup. Ct. Rep. 242; Seattle v. Oregon & W.R. Co., 255 U.S. 56, 63, 65 L.ed. 500, 506, 41 Sup. Ct. Rep. 237; Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 83-85, 67 L.ed 140, 144, 145, 43 Sup. Ct. Rep. 60."

The court below said:[28] "From a practical standpoint the equal footing principle must be recognized and maintained. There is no place in our federal system for a second class state." Unquestionably the conclusion of the court below makes the "equal footing" doctrine so inelastic that it would not admit of any exceptions. But the court below's conclusion is inconsistent with its acknowledgment[29] of the exceptions to the "equal footing" doctrine reflected in *Moore* v. *United States* (9 Cir.), 157 F.2d 760, *cert.* 330 U.S. 827, and in *United States* v. *Stotts* (W.D. Wash.), 49 F.2d 619, and of the several exceptions this Court cites in support of the rule so forcefully enunciated in *United States* v. *Holt State Bank.*

In *Case* v. *Toftus,* 39 F. 730, 731, Oregon (1889), an often quoted decision, the Court said of the "equal footing doctrine":

> "The true constitutional equality between the states only extends to the right of each, under the constitution, to have and enjoy the same measure of local or self-government, and to be admitted to an equal par-

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[28] Appendix 140a.

[29] Appendix 144a.

> ticipation in the maintenance, administration and conduct of the common or national government. * * * In the territories the national government is both sovereign and proprietor. * * * And as such sovereign or proprietor it may dispose absolutely of all of the public land in the territory whether high or low, wet or dry."

Case v. *Toftus* was decided more than a half century before Alaska became a state. But gauge the cogency of the Court's inquiries:

> Can any one say when, if ever, Alaska will be admitted into the Union, on an equal footing with Ohio, Pennsylvania, and New York? For aught that appears, it will ever be but very sparsely populated. Its commercial value is principally as a splendid preserve for fish and fur; while as a summer touring ground, and a place to get "far from the madding crowd," it is original and unequaled. Can it be possible that in the meantime the United States may not dispose of the private property in any of the "shore" of Alaska, which it purchased from Russia, but must hold it, willing or not, as trustee for some possible state or local sovereign that may arise or rule there in the far future?

It is enough to say that the conveyance of the fee title to the lands in Oklahoma to the Choctaws by the treaties of 1820 and 1830, and by the patent of 1842, and the removal of the Choctaws onto those lands were each "a public purpose, appropriate to the objects for which the United States held the Territory" and it was not cut off by the subsequent creation of Oklahoma, but remained unimpaired and the ownership of the bed of the navigable portion of the Arkansas River within its boundaries which otherwise would have passed to Oklahoma by virtue of its admission to the Union are restricted or qualified accordingly.

It cannot be said that the United States intended to reserve the bed of the navigable portion of the Arkansas either for itself or for the benefit of a hypothetical state which neither the Choctaws nor the Government ever thought would come into existence.

States entering the Union do so on an equal footing with the other states. The true constitutional equality in the sense of the "equal footing doctrine" extends, however, only to the right of each state under the Constitution to have and enjoy the same measure of local or self-government, and would be admitted to an equal participation in the maintenance, administration and conduct of the common or national government. It does not require that the new state should be admitted to any right in the soil thereof considered as property.

The "equal footing doctrine" refers to political rights of sovereignty, not economic stature or standing. Thus, this Court, speaking through Mr. Justice Douglas in the celebrated *Tidelands* case,[30] said:

> "The 'equal footing' clause has long been held to refer to political rights and to sovereignty. See Stearns v. Minnesota, 179 US 223, 245, 45 L. ed 162, 174, 21 S Ct 73. It does not, of course, include economic stature or standing."

In its decision the court below said:[31] "Title to the riverbed in question passed to Oklahoma on admission unless prior thereto Congress disposed of the federal title for a public purpose by an action showing a clear intent to

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[30] *U. S.* v. *Texas*, 339 U.S. 709, 716, 94 L.Ed. 1222, 1226.

[31] 141a.

make such divestiture. Such intent is not definitely declared in the grant. The question is whether the surrounding circumstances make that intent very plain."

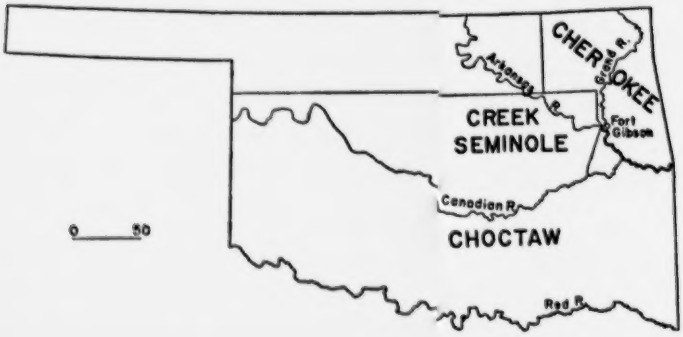
"The intent is said to be established by the agreement of the United States that no state or territory would be created in the area granted. The acceptance of this position would have widespread implications because, as we have seen, other states were created in areas covered by Indian treaties having similar provisions to those found in the Treaties of New Echota and Dancing Rabbit Creek. We believe that such provisions had to do with the exercise of political power rather than with property rights. The political aspects were changed by the Indians' acceptance of the nullification of the treaties. The property rights were unaffected by either the recognition or the nullification of the treaty provisions concerned with the creation of state or territorial governments."

The court below cited no judicial precedent for its belief. Indeed, none has been suggested in any of the briefs or in the arguments advanced by Oklahoma. This belief of the court below seems to have been borrowed from this Court's construction of the "equal footing doctrine." It parallels the language of Mr. Justice Douglas in the *Tidelands* case. But at Doak's Stand in 1820, and at Dancing Rabbit Creek in 1830, the United States on the one side, and the Choctaws on the other side, were not talking about a future state embracing the area to be ceded to the Choctaws and it entering the Union on an equal footing with other states. The converse—that the area would never be embraced in a future state—was the subject of those talks. The "equal footing doctrine" had no relation to the compact

upon which the minds of the treating parties met at Doak's Stand and at Dancing Rabbit Creek.

As the United States agreed that he area ceded to the Choctaws would not be embraced in a future state, then for what reason can it be said that the United States would have wanted to have reserved the soil and minerals underlying that short portion of the Arkansas River which is navigable within the present boundaies of Oklahoma?

The following map shows Oklahoma and the lands ceded to the southern tribes and to which they were removed from their aboriginal homes east of the Mississippi. It shows the confluence of the Grand River and the Arkansas. That strip of the Arkansas below its confluence with the Grand River was the only navigable waters in Oklahoma and is the part involved in these cases. It has been shaded more prominently to facilitate identification.



It cannot be seriously argued that this short stretch of the Arkansas River was reserved by the United States from the operation of the treaties at Doak's Stand and at Dancing Rabbit Creek as an avenue of commerce to Mexican lands

hundreds of miles overland to the west[32] or to any of the lands north of the area ceded to the Cherokees and the Creeks and Seminoles, which were also separated from it by hundreds of overland miles.

In its decision the court below consistently returned to the thesis that in treating with the Choctaws, the United States always intended that the area ceded to the Choctaws should be embraced in a future state. Thus at 145a we hear the court below saying: "It requires a clear and definite intent to convey the beds of the navigable rivers *which otherwise would pass to a state on admission.*" And, "nothing in the treaties, statutes, and conveyances establish an intent by the United States *as trustee for the states to be formed,* to convey away property *held for the benefit of the new state.*" (Emphasis supplied.)

We must inquire into the validity of the conclusion of the court below that the United States always—even as it negotiated and signed the treaties at Doak's Stand and at Dancing Rabbit Creek—intended that a state was to be formed in the lands ceded to the Choctaws and that it was holding the bed of the navigable portion of the Arkansas in that area for the benefit of the hypothetical future state.

John C. Calhoun, the Secretary of War of the United States, urging the Choctaws to retrocede to the United

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[32] Oklahoma was then on the western frontier of the United States. Beyond it lay Mexico. Mexico gained its independence from Spain in 1821. Texas gained its independence from Mexico in 1836 and entered the Union in 1845.

The treaty with the Choctaws of September 27, 1830, at Dancing Rabbit Creek, described the lands conveyed to the Choctaws as, "beginning near Fort Smith where the Arkansas boundary crosses the Arkansas River, thence to the source of the Canadian fork; *if in the limits of the United States, or to those limits . . .*"

States that part of their lands lying in Arkansas, said to their delegation in Washington in 1824: *"There is no probability that any State or territory will be erected to the west of the Arkansas territory . . ."*[33] Two months later Calhoun's negotiations with the Choctaw delegation in Washington resulted in the Treaty of 1825,[34] which established the permanent boundary line between the United States and the Choctaws and in which the United States agreed in reference to such line that it would ". . . *prevent future settlements from being made on the west thereof.*"

On November 11, 1826, at the Treaty Grounds of the Choctaws, General William Clark, General Thomas Hinds, and General John Coffee said to them: "The United States have a large unsettled and unappropriated country on the west side of the great river Mississippi *into which they do not intend that their white settlers shall extend.* This is the country in which our father the President intends to settle all his Red Children."

In urging the Chickasaws to move to the west, President Jackson said to them in August, 1830, at Franklin, Tennessee: "Peace invites you there, annoyances will be left behind; *within your limits no State or territorial authority will be permitted.*"

Jackson's Secretary of War, John H. Eaton, and General Coffee were with him at Franklin, Tennessee. On his instructions they proceeded on to Dancing Rabbit Creek in Mississippi where they met with the Choctaws on Sep-

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[33] 7 Stat. 234, Proclamation, February 19, 1825.

[34] American State Papers, Vol. II, pages 549-550.

tember 15, 1830. On September 18th, they exhorted the Choctaws to move to the country west of the Mississippi, pledging to them that out of the lands to be ceded them, west of the Mississippi, ". . . *no State or Territory will be created . . .*"[35]

Article IV of the treaty concluded with the Choctaws at Dancing Rabbit Creek on September 27, 1830, was a result of these pledges. It provided that:

> "The Government and people of the United States are hereby obliged to secure to the said Choctaw Nation of Red People by jurisdiction and government of all the persons and property that may be within their limits west, so that no territory or State shall ever have the right to pass laws for the government of the Choctaw Nation of Red People and their descendants; and that *no part of the land granted to them shall ever be embraced in any Territory or State; . . .*"

There has never been a decision in any court of record concerning the ownership of the navigable portion of the Arkansas River in which either the Choctaw or Chickasaw Nations were parties. There has never been a decision by any court involving the ownership of the navigable portions of the bed of the Arkansas River in which the ownership of the Choctaw Nation or the effect of the Treaties at Doak's Stand or Dancing Rabbit Creek on the ownership of the soil underlying the navigable portion of the Arkansas was raised or taken into consideration. This is the first forum in which the Choctaw and Chickasaw Nations have had an opportunity to be heard.

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[35] Senate Documents Indian Removals 23d Congress, 1st Session, Document 512. American State Papers, Indian Affairs, Vol. II, page 257.

In the courts below, Oklahoma relied heavily upon the decisions of its Supreme Court in *State* v. *Nolegs*, 139 Pac. 943; *Vickery* v. *Yahola Sand and Gravel*, 12 P.2d 881. Each of these cases is predicated upon the conclusion of the Supreme Court of Oklahoma, that notwithstanding its treaties with the Choctaws, the bed of the navigable portion of the Arkansas ". . . was retained and held by the United States in trust for the future state and upon admission of the State of Oklahoma to the Union in 1907, the title thereto vested and became the property of the State of Oklahoma."

In *State* v. *Nolegs*, Oklahoma brought an action to quiet title to an island in the Arkansas River against Nolegs, a member of the Osage Tribe of Indians. The Jim Crow Oil Company intervened.

The Oklahoma Court held that the ownership of the navigable water and soil under them and all of the territory embraced in the Louisiana Purchase was held in trust by the Federal Government for the benefit of future states, and, as each of the states was created, the same, within the boundary of such state, passed to it, and the absolute right to the navigable waters and the soil thereunder was in the State of Oklahoma. Apparently the decision of the court was influenced by an incident which occurred in March, 1908, in which the United States Indian Agency had been asked to enter into a contract for taking sand and gravel from the Arkansas within the limits of the Cherokee Nation. At that time there were other contracts for taking sand and gravel from the Arkansas. It was contended that after statehood neither the Cherokee Nation nor the Department of the Interior had further jurisdiction to the matter and that the contractors should no longer

be required to pay them royalty for sand and gravel taken from the navigable portion of the Arkansas. The acting commissioner of Indian Affairs held that the warranty deeds, by virtue of which the sand and gravel was being removed, became void upon Oklahoma becoming a state because, as he said: "In other words, when the United States conveyed by warranty deed the lands occupied by Cherokees, Creeks, Choctaws, Chickasaws and Seminoles, it did not convey the bed of the navigable streams, but reserved them for the benefit of the future state within whose boundaries they would fall."

In the early 1930's, an action was commenced by one Vickery against the Yahola Sand and Gravel Company in which one of the issues was the ownership of the bed of the Arkansas. After an appeal was perfected to the Supreme Court of Oklahoma (158 Okla. 120, 12 P.2d 881), the State of Oklahoma *ex rel* the Commissioners of the Land Office intervened. In its opinion, the court acknowledged the validity of the rule in *Shively* v. *Bowlby*[36] that Congress has the power to make grants of land below the high-water mark of navigable waters in any territory of the United States where it becomes necessary to do so in order to carry out the public purposes (second column of page 883). But then (the latter part of first column of page 885) the court reasoned that it would be far better for the Cherokees ". . . that the title to the navigable portions of the Arkansas be kept and held in the United States for the ultimate use and benefit of the future state, if and when, by the consent of the Cherokee Tribe, a state should be erected embracing the land so granted to them."

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[36] 152 U.S. 1.

The Treaty of Dancing Rabbit Creek, September of 1830, was negotiated by the Secretary of War, John H. Eaton, and General John Coffee, for and in behalf of the United States, with Greenwood LeFlore, Moshulatubbee, and Nitakechi, for the Choctaws. We can imagine the following conversation between Mr. Eaton for the United States and Moshulatubbee for the Choctaws at the signing of the treaty:

Mr. Eaton: The treaty is ready for our signatures, and there is nothing wrong with what has been written, but I now see that an important provision has been omitted.

Moshulatubbee: What is that?

Mr. Eaton: There should be a provision in the treaty that the United States reserves the ownership of the sands and soils in the bed of the Arkansas River.

Moshulatubbee: Why in the world would you want a long strip of sand and soil in the heart of the Indian country?

Mr. Eaton: The Arkansas is a navigable river, and it has long been the policy of the United States to reserve the beds of navigable rivers for future states.

Moshulatubbee: But, you forget that this treaty provides that no state or territorial government shall ever be established along the lands that you have granted us, and the Cherokee treaty to the north contains a like provision.

Mr. Eaton: But we need this provision. The War Department through its engineers needs to remove the stumps from the river so we can get our boats up to Fort Gibson.

Greenwood LeFlore: But in Article IV you have provided that the laws passed by the Choctaws' National Council shall be not inconsistent with the Constitution, treaties and laws of the United States, and your power to regulate commerce is enough for your purpose without ownership of the riverbed.

United States v. Holt State Bank is not a relevant precedent because, without any qualifying words, the Government conveyed to the Choctaws a fee-simple title to the lands ceded to them in what is now Oklahoma and further guaranteed ". . . that no part of the land granted to them shall ever be embraced in any Territory or State."

On discovery of the American continent, the principle was asserted and acknowledged by all European nations that discovery followed by actual possession gave title to the Government, by whose subject and authority it was made, not only against other European governments, but against the natives themselves.[37]

In the United States, the right of the European discoverers, having been succeeded to by the states or by the Federal Government, the Indian title to land is a right of possession and occupancy, the fee being in the Federal Government.[38] However, under the Constitution the United States has the power to convey a fee-simple title to Indian Tribes.[39]

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[37] *Butts* v. *Northern Pacific Railway*, 7 Sup.Ct. 100, 119 U.S. 55; *Beecher* v. *Wetherby*, 95 U.S. 517.

[38] *U. S.* v. *Santa Fe Pacific Railway Company*, 314 U.S. 339, 312 U.S. 695; *M. K. & T. Railway Co.* v. *U. S.*, 235 U.S. 37.

[39] *Hynes* v. *Grimes Packing Company*, 337 U.S. 86, 103, 104.

In *United States* v. *Holt State Bank*[40] the fee was in the United States, the Indians having only a right of occupancy. In the case at bar, however, the fee was in the Choctaws. This significant fact interdicts *United States* v. *Holt State Bank*.[41]

The claim of the Choctaws in the case at bar is bottomed on the premise that, by the treaties of 1820 and 1830, and the patent of 1842, they became the owners of the fee-simple title to the lands ceded to them in what is now Oklahoma, and in making the grant to them the Government guaranteed that the area would never be embraced by any State or Territory. *Conversely, United States* v. *Holt State Bank* is bottomed on the premise that the fee to the lands involved there was vested in the Government, the Indians having only a right of occupancy,[42] and that the area would be embraced by a future state.

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40 270 U.S. 49, 70 L.Ed. 465.

41 The case at bar deals with the construction of Article II of the Treaty entered into with the Choctaws at Dancing Rabbit Creek on September 27, 1830 (7 Stat. 333), which provides: "The United States under grant especially to be made by the President of the United States shall cause to be conveyed to the Choctaw Nation a tract of the country west of the Mississippi river *in fee simple . . .*" *United States* v. *Holt State Bank* dealt with the Chippewa treaty entered in the City of Washington on February 22, 1855 (10 Stat. 1165), the first article of which provided: "And the said Indians do hereby fully and entirely relinquish and convey to the United States any and all right, title and interest, of whatever nature the same may be, which they may now have, and to any other lands in the Territory of Minnesota or elsewhere."

42 The Court observed at 270 U.S. 58, 70 L.Ed. 470: "The effect of what was done was to reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory; and thus it came to be known and recognized as a reservation. Minnesota v. Hitchcock, 185 U.S. 373, 389, 46 L.Ed. 954, 963, 22 Sup.Ct. Rep. 650."

In *United States* v. *Holt State Bank* the Indian tribe was the grantor. The Government was the grantee. The Court noted[43] that when the Indian tribe made the cession to the Government: "There was no formal setting apart of what was not ceded . . ." The Court is there saying that the Chippewas were the grantors and had they wanted to keep the soil and the minerals underlying Mud Lake, they should have formally set them apart from their cession.

This Court, in reviewing the treaties between the Chippewas and the United States, did not find in *United States* v. *Holt State Bank:* ". . . anything evidencing a purpose to depart from the established policy, before stated, of treating such lands as held for the benefit of the future state."[44]

The *sine qua non* of Minnesota's ownership of the soil and minerals underlying Mud Lake are: *First,* the lands were not ceded by the United States to the Chippewas. The reverse was true. The Chippewas ceded the land to the United States without any reservation except the right of occupancy. *Second,* the Chippewas having ceded the lands to the United States prior to Minnesota becoming a State, the policy of treating lands underlying navigable waters for the benefit of future states became applicable.

But the absolute prerequisites to Oklahoma's ownership of the soil and minerals underlying the navigable portion of the Arkansas River within its borders are missing from the case at bar. For here, without qualifying words, the United States had conveyed to the Choctaws the fee-simple

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[43] First column, 70 L.Ed. 470.

[44] 270 U.S. 58, 70 L.Ed. 470.

title to their lands in what is now Oklahoma. And here the policy of retaining the bed of navigable streams in those lands for the benefit of a future State has no application because the United States had by treaty specifically guaranteed the Choctaws *"that no part of the lands granted to them shall ever be embraced in any Territory or State"* (Article IV of the Treaty of 1830).

Paraphrased to reflect the facts in the case at bar, *United States* v. *Holt State Bank* would have read:

> The United States was the grantor of the patent of 1842 conveying to the Choctaws, without any qualifying words, the fee-simple title to their lands in what is now Oklahoma. *There was no formal setting apart of what was not ceded.* The guarantee given by the United States in its treaties with the Choctaws that no part of the lands granted to them shall ever be embraced in any Territory or State *evinced a purpose to depart from the established policy of treating such lands as held for the benefit of a future state.*

Had this Court been addressing itself to the facts in the case at bar, it would have said in *United States* v. *Holt State Bank* that, as the Government was the grantor of the lands in what is now Oklahoma and the Choctaws were the grantees, and that it was not intended in either 1820 or 1830 that the lands should be embraced in a future State or Territory, if the Government had wanted to keep the soil and the minerals underlying the navigable streams in those lands, it should have formally set them apart from its grant.

In effect the court below's construction of Northern Pacific Railway Company v. Soderberg, 188 U.S. 526, 534 and Caldwell v. United States, 250 U.S. 14, 20, vitiates Choctaw Nation v. United States, 119 U.S. 1, 27, 28, 31 L.Ed. 315, Jones v. Meehan, 117 U.S. 1, 10, 11, Choctaw Nation of Indians v. United States, 318 U.S. 423, 431, 432, 87 L.Ed. 877, 882, 883 and the stipulation in the last sentence of Article XVIII of the Treaty concluded at Dancing Rabbit Creek in 1830 that ". . . in the construction of this treaty wherever well-founded doubt shall arise, it shall be construed most favorably to the Choctaws."

In its opinion, the court below said:[45] "We recognize that an Indian treaty is to be liberally construed in favor of the Indians as unlettered people understood it and as justice and reason demand when the strong assert power over those to whom they owe care and protection. Another rule of construction is that in a grant by the sovereign nothing passes by implication.", citing *Northern Pacific Railway Company* v. *Soderberg* and *Caldwell* v. *United States*. The court below then said: "*Holt State Bank* extends this rule to a situation relating to Indian lands and the equal footing-implied trust doctrine. Although *Holt State Bank* did not deal with a claim presented by Indians and although the United States is not a party to this case, we believe that the rule announced in that decision must apply. *It requires a plain and definite intent to convey the bed of navigable rivers which otherwise would pass to a state on admission.* * * * Nothing in the treaties, statutes or conveyances establishes an intent by the United States, *as trustee for states to be formed*, to convey away property held for the benefit of the new states." (Emphasis supplied.)

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[45] 145a.

The pith of the decision of the court below is that a construction of the treaties of 1820 and 1830 must be adopted which would have supported a claim of the United States to the soil and minerals underlying the navigable portion of the Arkansas River in the area ceded to the Choctaws if that claim had been asserted immediately after the signing of those treaties.

The court below thus placed this Court's decisions in *Northern Pacific Railway Company* v. *Soderberg* and *Caldwell* v. *United States, vis-avis* its decisions in *Choctaw Nation* v. *United States, Jones* v. *Meehan, Choctaw Nation of Indians* v. *United States, Winters* v. *U. S.*, 207 U.S. 564, 576, 577, *Worcester* v. *Georgia*, 6 Pet. 515, 582, 8 L.Ed. 483, 508, *Carpenter* v. *Shaw*, 280 U.S. 263.

Northern Pacific Railway Company v. *Soderberg* was a bill filed by the railway company to enjoin Soderberg from taking granite from land of which he had taken possession under a mineral location and for an accounting of the granite quarried or removed. The railway company alleged its incorporation under the Act of July 2, 1864 (13 Stat. 365) and the grant to it by that Act of every alternate odd-numbered section of public land, not mineral, and to the amount of twenty alternate sections per mile on each side of the line when passing through the territories. The bill further alleged that the principal value of the land in dispute consisted of a ledge of granite; that in 1898, Soderberg entered upon the land and began to quarry and remove the granite under a mineral location. Soderberg answered that the lands were mineral in character, and as such excepted from the Act.

The construction of that grant was governed by the general rule— ". . . that grants from the sovereign should receive a strict construction,—a construction which would support the claim of the government rather than that of the individual."

Caldwell v. *United States* was an action brought by Caldwell to recover the value of certain timber cut from the public lands of the United States in the State of Colorado.[46] Caldwell based his right of recovery upon contracts with the Denver, Northwestern and Pacific Railway Company which had been given the right by the Act of Congress of March 3, 175 (18 Stat. 482), to take from the public lands adjacent to its line, timber necessary for the construction of its railroad. Under contract with the railway company, Caldwell moved from lands adjacent to the railroad approximately 88,000 ties and delivered them to the company. After the ties were moved, a large amount of "tie slash" was left. Caldwell attempted to sell about 200 cars of "tie slashes" to the Frazier River Timber Company and to the Leyden Coal Company to be used as mining props. Officers of the Forest Service refused to allow Caldwell's transferees to have a large portion of the "tie slash" of which they took possession and sold, the proceeds being placed in the treasury of the United States. Caldwell then brought that action to recover the sums paid into the treasury of the United States claiming that there was no provision in the Act of March 3, 1875, for disposition of what remained of trees after portions of them had been

[46] Called "tie slash" and "tie slashing," the term being used to describe the tops of trees, the bodies of which had been used for making railroad ties.

used for making ties for railroad purposes. He argued that the railroad company was entitled to the "tie slash" as incident to its right to cut under the Act of Congress. This Court held that grants such as the one given by the Act of March 3, 1875, must be construed favorably to the Government; that nothing passed but that which was conveyed in clear and explicit language—inferences being resolved, not against, but for, the Government.

The facts in the case at bar are not faintly suggestive of those in *Northern Pacific Railroad Company* v. *Soderberg or Caldwell* v. *United States*. For the United States stipulated by the last sentence in Article XVIII of the treaty concluded at Dancing Rabbit Creek in 1830, that:

> "... in the construction of this treaty wherever well founded doubt shall arise, it shall be construed most favorably towards the Choctaws."

This provision reflects the policies established by both the Government and the courts before the Treaty at Dancing Rabbit Creek and followed without exception since. Thus, we hear this Court saying in *Choctaw Nation* v. *United States*, 119 U.S. 1, 27, 28, 30 L.Ed. 315 (1886):

> "It had accordingly been said in the case of Worcester v. Georgia, 6 Peters, 582 (3 U.S. bk. 8, L.ed. 508): 'The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import as connected with the tenor of the treaty, they should be considered as used only in the latter sense. * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.'

"The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorized the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules, framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws.

"The rules to be applied in the present case are those which govern public treaties, which, even in case of controversies between nations equally independent, are not to be read as rigidly as documents between private persons governed by a system of technical law, but in the light of that larger reason which constitutes the spirit of the law of nations. And it is the treaties made between the United States and the Choctaw Nation, holding such a relation, the assumptions of fact and of right which they presuppose, the acts and conduct of the parties under them. The rule of interpretation already stated, as arising out of the nature and relation of the parties, is sanctioned and adopted by the express terms of the treaties themselves."

And again, in 1943, in *Choctaw Nation of Indians* v. *United States,* 318 U.S. 423, 431, 432, 87 L.Ed. 877, 882, 883:

"Of course treaties are construed more liberally than private agreements, and to ascertain their mean-

ing we may look beyond the written words to the history of the treaty, the negotiations and the practical construction adopted by the parties. Factor v. Laubenheimer, 280 US 276, 294, 295, 78 L.ed. 315, 324, 325, 54 S.Ct. 191, Cook v. United States, 288 US 102, 112, 77 L.ed. 641, 646, 53 S.Ct. 305. Especially is this true in interpreting treaties and agreements with the Indians; they are to be construed, so far as possible, in the sense in which the Indians understood them, and 'In a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.' Tulee v. Washington, 315 US 681, 684, 685, 86 L.ed. 1115, 1119, 1120, 62 S. Ct. 862. See also United States v. Shoshone Tribe, 304 US 111, 116, 82 L.ed. 306, 315, 7 S. Ct. 75."

In *Jones* v. *Meehan*, 175 U.S. 1, 10, 11, this Court said:

"In construing any treaty between the United States and an Indian tribe, it must always (as was pointed out by the counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by respresentatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language, and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to

learned lawyers, but in the sense in which they would naturally be understood by the Indians."[47]

The court below's construction of *Northern Pacific Railway Company* v. *Soderberg* and *Caldwell* v. *United States* vitiates the rule enunciated by this Court in *Choctaw Nation* v. *United States,* 119 U.S. 1; *Jones* v. *Meehan,* 117 U.S. 1; *Choctaw Nation of Indians* v. *U. S.,* 318 U.S. 423; *Worcester* v. *Georgia,* 6 Pet. 515; *Carpenter* v. *Shaw,* 280 U.S. 263, and the provisions in the treaty of September 27, 1830, with the Choctaws that ". . . in the construction of this treaty wherever well-founded doubt shall arise it shall be construed most favorably to the Choctaws."

The thesis that references to the Arkansas River in the Treaties of 1820, and 1830, are for the purpose of establishing reference points, monuments or boundaries is tenable only if by those treaties the United States intended to retain the ownership of the navigable portion of the Arkansas River in trust for a future state.

By Article II of the treaty concluded at Doak's Stand on October 18, 1820, the United States ceded to the Choctaws a tract of land bounded as follows: "—beginning on the Arkansas River, where the lower boundary line of the Cherokee strikes the same; thence up the Arkansas to the Canadian Fork, and up the same to its source; thence due south to the Red River; thence down Red River three miles below the mouth of Little River which empties into Red River on the north side; thence a direct line to the beginning."[48]

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47 Of the 176 signatories on behalf of the Choctaw Nation, 166 signed by mark.

48 7 Stat. 210, Proclamation, January 8, 1821.

In its opinion,[49] the court below said: "We agree with Oklahoma that references to the Arkansas River are for the purpose of establishing reference points, monuments or boundaries. They do not indicate an intent, much less a clear intent, to convey the riverbed."

It is respectfully submitted that this conclusion of the court below is at sixes and sevens with the well-established rule that where the United States owns the bed of a non-navigable stream and the upland of one or both sides, it is free when disposing of the upland to retain all or any part of the riverbed; and whether, in any particular instance, it has done so, is essentially a question of what is intended. If its intention is not otherwise shown it will be taken to have assented that its conveyance of the upland operate as a conveyance of the riverbed. *United States* v. *Arizona*, 295 U.S. 1, 79 L.Ed. 1267, 55 Sup. Ct. 610; *Wilcox* v. *Jackson*, 13 Pet. 498, 516, 517, 10 L.Ed. 264, 273; *Irvine* v. *Marshall*, 20 How. 558, 15 L.Ed. 994; *Gibson* v. *Chouteau*, 13 Wall. 92, 99, 20 L.Ed. 534, 536; *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 404, 61 L.Ed. 791, 816, 37 Sup. Ct. Rep. 387; *Kean* v. *Caulment Canal & Improv. Co.*, 190 U.S. 452, 460, 47 L.Ed. 1134, 1137, 23 Sup. Ct. Rep. 651; *Hardin* v. *Jordan*, 140 U.S. 371, 384, 35 L.Ed. 428, 434, 11 Sup. Ct. Rep. 808, 838; *Mitchell* v. *Smale*, 140 U.S. 406, 413, 414, 35 L.Ed. 442, 445, 11 Sup. Ct. Rep. 819, 840; *Grand Rapids & I.R. Co.* v. *Butler*, 159 U.S. 87, 92, 40 L.Ed. 85, 87, 15 Sup. Ct. Rep. 991; *Hardin* v. *Shedd*, 190 U.S. 508, 519, 47 L.Ed. 1156, 1157, 23 Sup. Ct. Rep. 685; *Whitaker* v. *McBride*, 197 U.S. 510, 512, 515, 516, 49 L.Ed. 857, 860-862,

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[49] 144a.

25 Sup. Ct. Rep. 530; and see *St. Paul & P. R. Co.* v. *Schurmeir*, 7 Wall. 272, 287, *et seq.*, 19 L.Ed. 74, 78.

It would be a curious thing indeed to construe the term "up the Arkansas" to mean "up the south bank of the Arkansas to the point where it becomes non-navigable and from that point up the north bank." Such a thesis could only be sustained if the United States and the Choctaws had agreed by the treaties of 1820 and 1830 that the territories conveyed to the Choctaws were to become embraced in a future state, in which event, of course, the bed of the navigable portion of the Arkansas would then have been held by the United States in trust for the benefit of the future state. Since it is plainly evident that it was not the intent of the United States and the Choctaws at the time they made the treaties of 1820 and 1830 that the lands ceded to the Choctaws should become a part of a state, that thesis is not tenable.

At the most, by the Treaty of 1830, the United States only reserved a navigation easement on the Arkansas River.

Oklahoma has contended that, as the Treaty of 1817 established the southern boundary of the Cherokees on the north bank of the Arkansas, the first sentence of Article XI of the Treaty of 1830 with the Choctaws which provided: "Navigable streams shall be free to the Choctaws who shall pay no higher toll or duties than citizens of the United States," established the south bank of the Arkansas as the northern boundary of the Choctaw lands. Thus, syllogized the State, the Government never ceded the bed of the river itself.

What Oklahoma has done is this: It has excerpted one sentence from Article XI and attempted to have it read out of context. The whole of the Article reads:

> "Navigable streams shall be free to the Choctaws who shall pay no higher toll or duty than citizens of the U. S. It is agreed further that the U. S. shall establish one or more Post Offices in said Nation, and may establish such military post roads, and posts, as they may consider necessary."

In construing a treaty all provisions relevant to the matter under consideration must be considered[50] and, where reasonably possible, meaning should be given to all the words.[51] A treaty should be construed in the light of the circumstances existing at the time it was entered into[52] and the objects that the parties were desirous of effecting.[53] Furthermore, where the meaning of a treaty is uncertain, recourse may be had to the negotiations and diplomatic correspondence of the contracting parties with respect to the subject matter.[54]

When Article XI is construed as a whole, it is evident that the treaty signatories intended that the Government should reserve a right to establish post offices and military

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[50] *Perkins* v. *E.L.G.*, 59 S.Ct. 884, 307 U.S. 325, 83 L.Ed. 1320.

[51] *Factor* v. *Laubenheimer, supra.*

[52] *Pigeon River Imp. Slide & Boom Co.* v. *Charles W. Cox, Ltd.*, 54 S.Ct. 361, 291 U.S. 138, 78 L.Ed. 695.

[53] *Rice* v. *Sioux City Memorial Park Cemetery*, 60 N.W.2d 110, *dismissed* 75 S.Ct. 614, 349 U.S. 70, 90 L.Ed. 897.

[54] *Choctaw Nation of Indians* v. *United States*, 63 S.Ct. 672, 318 U.S. 423, 87 L.Ed. 492.

posts and such easements over streams and over land as might be convenient to the operation of post offices, the supplying of military posts and the bringing of supplies and commodities into the Choctaw country.

It will be remembered that the removal of the Indians from the southern states to the lands west of the Mississippi was a concerted effort. The Cherokees had moved west of the Mississippi into lands in Arkansas in 1817, just a few years before the Choctaws. The last sentence of Article V of the Treaty of 1817 with the Cherokees provided ". . . the United States reserving the right of establishing factories, a military post, and roads, within the boundaries above defined." And Article IX of that treaty provided: ". . . that nothing in the foregoing articles shall be construed so as to prevent any of the parties so contracting from the free navigation of all the waters mentioned therein." Those terms, in the treaty with the Cherokees in 1817 are, for all practical purposes, the same as Article XI of the treaty with the Choctaws in 1830.[55]

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[55] A similar provision was found in many other Indian Treaties. In a Treaty with the Cherokees approved July 2, 1791, 7 Stat. 39, 2 Kappler 22, a Cherokee boundary was established in Article V of the Treaty which reads as follows:

> "It is stipulated and agreed, that the citizens and inhabitants of the United States, shall have a free and unmolested use of a road from Washington district to Mero district, and of the Tennessee river."

In a Treaty with the Six Nations of November 1794, 7 Stat. 44, 2 Kappler 28, lands were involved along Lake Ontario and Lake Erie. Article V of this treaty provides with reference to roads, rivers, and harbors, as follows:

> "And the Six Nations, and each of them, will forever allow to the people of the United States, a free passage through their lands, and the free use of the harbors and rivers adjoining and within

It will be noted from the start that the sentence from Article XI, upon which the State has placed so much reliance, covers all streams wherever they might be located within the Choctaw lands. It neither singled out nor limited its operation to the Arkansas.

In 1830, very little was known about the rivers in the lands ceded to the Choctaws. Many had not been surveyed and very few had been traveled their full length. From later exploration and travel it became known that the Arkansas was the only navigable river within the lands ceded to the Choctaws. The use of the all inclusive term "navigable streams shall be free to the Choctaws" is just another way of repeating the terms of the treaty with the Cherokees ". . . that nothing in the foregoing articles shall be construed so as to prevent any of the parties so contracting from the free navigation of all the waters mentioned therein."

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55 (Continued)

their respective tracts of land, for the passing and securing of vessels and boats, and liberty to land their cargoes where necessary for their safety."

In a Treaty with the Sac and Foxes of November 3, 1804, 7 Stat. 84, 2 Kappler 54, the Indians gave the United States permission to establish a military post either on the upper side of the Ouisconsing or on the right bank of the Mississippi, and did further agree:

". . . that they will at all times allow to traders and other persons travelling through their country under the authority of the United States a free and safe passage for themselves and their property of every description. And that for such passage they shall at no time and on no account whatever be subject to any toll or exaction."

A Treaty with the Creeks, November 14, 1805, 7 Stat. 96, 2 Kappler 62, reads as follows:

"And it is also agreed on the part of the Creek nation, that the navigation and fishery of the Ocmulgee, from its junction with the

Viewed against the background of the concerted effort to remove all Indians out of the southern states and onto lands west of the Mississippi, together with the manifested desire of the Government to treat all Indian tribes equally, it is apparent that, in its treaty with the Choctaws, the Government was reserving nothing more than it had in the treaty with the Cherokees; that is, "free navigation of all of the waters mentioned therein."

In the light of the circumstances existing at the time the treaty with the Choctaws was entered into and the objects that the Government and the Choctaws were desirous of effecting, it is obvious that the Government had no need of anything but a navigation easement on the streams in

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55 (Continued)

Oconee to the mouth of the Ulcofauhatchee, shall be free to the white people; provided they use no traps for taking fish; but nets and seines may be used, which shall be drawn to the easterly shore only."

By a Treaty with the Cherokees of March 22, 1816, 7 Stat. 139, 2 Kappler 87, the United States was granted the free use of certain roads through the Cherokee nation for intercourse between the states of Tennessee and Georgia and Mississippi Territory. Article 2 of the treaty then went on to provide that:

". . . the citizens of the United States shall freely navigate and use, as a highway, all the rivers and waters within the Cherokee nation. The Cherokee nation further agree to establish and keep up, on the roads to be opened under the sanction of this article, such ferries and public houses as may be necessary for the accommodation of the citizens of the United States."

Article III of a Treaty of peace between the United States of America and the tribes of Indians, called the Wyandots, Delawares, Shawanoes, Ottawas, Chippewas, Putawatimes, Miamis, Eel-river, Weea's, Kickapoos, Piankashaws, and Kaskaskias, of August 3, 1795, 7 Stat. 49, 2 Kappler 30, reads:

"And the said Indian tribes will also allow to the people of the United States the free use of the harbors and mouths of rivers along the lakes adjoining the Indian lands, for sheltering vessels and boats, and liberty to land their cargoes where necessary for their safety."

the Choctaw lands. It did not need the bed of streams that would re-emerge by avulsion. It did not need the minerals that might underlie the beds of the streams in the Choctaw lands. It did not need to reserve the soil of the beds of navigable streams and the minerals underlying them in trust for a future state because it had guaranteed to the Choctaws ". . . that no part of the land granted to them shall ever be embraced in any Territory or State."

Indeed, if the Choctaws had traded the United States the bed of the streams within its tribal domain east of the Mississippi and the minerals underlying them, then, by the same token, the United States was, by its treaty, trading to the Choctaws the beds of all of the streams and the minerals underlying them in the lands ceded to them west of the Mississippi. To say otherwise is to say that the Government was seeking an advantage for itself. This it did not intend to do. The Court said in *United States* v. *Shoshone Tribe of Indians.*[56]

> "In treaties made with them the United States seeks no advantage for itself."

Finally, it must be remembered that by Article XVIII of this treaty the Government agreed ". . . that in the construction of this treaty wherever well founded doubt shall arise, it shall be construed most favorably towards the Choctaws." The construction of this provision most favorable to the Choctaws is that, as with the treaty a few years earlier with the Cherokees, the Government retained only an easement for the "free navigation of all of the waters mentioned therein."

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[56] 58 S.Ct. 794, 304 U.S. 111, 116, 117, 82 L.Ed. 1218, 1219.

CONCLUSION

The removal of the Indians from the southern states to the lands west of the Mississippi was a purpose appropriate to the objects for which the United States held the territory. General Clark, General Thomas, and General Hinds, who, as commissioners for the United States negotiating for the removal of the Choctaws from Mississippi, demonstrated the appropriateness of that purpose when they said to them in an address at the treaty ground of the Choctaw Nation in 1826: "The United States have a large unsettled and unappropriated country on the west side of the great river Mississippi, into which they do not intend that their white settlers shall extend. This is the country in which our father the President intends to settle all of his Red children."

The "Indian Removal Act" of May 28, 1830, making it ". . . lawful for the President of the United States to cause so many of any territory belonging to the United States, west of the river Mississippi, not included in any State or organized territory, and to which the Indian title has been extinguished, as he may judge necessary, to be divided unto a suitable number of districts, for the reception of such tribes of Nations of Indians as may choose to exchange the lands where they now reside and remove there . . ." was a proper method through which the United States accomplished a purpose appropriate to the object for which it held the territories.

It is settled law that Congress has the power to make grants of land below the high-water mark of navigable rivers in any territory of the United States to carry out public purposes appropriate to the objects for which the

United States held the territory (*Brewer-Elliott Oil and Gas Co.* v. *United States*, 260 U.S. 77, 84). It is equally well settled that where the United States, after acquiring the territory and before the creation of the State, has granted rights in such lands for the purpose of carrying out purposes appropriate to which the objects for which the territory was held, such rights are not cut off by the subsequent creation of a State, but remain unimpaired, and the rights which otherwise would have passed to the State by virtue of its admission into the Union are restricted and qualified accordingly. (*United States* v. *Holt State Bank*, 270 U.S. 49, 54, 55, 70 L.Ed. 465, 468.)

John C. Calhoun's pledge to the Choctaw delegation in Washington in 1824 "There is no probability that any State or territory will be erected to the west of the Arkansas territory;" the provision in the Treaty of 1825 establishing the western boundary line of the present State of Arkansas by which the United States covenanted that it would "prevent future settlements from being made on the west thereof;" the pledge of the United States given to the Choctaws through its commissioners, General Clark, General Hinds, and General Coffee in 1826, that there the United States would "guard you against all enemies, whether they be white or red; and no State or territory will be created;" the promise of the President, Andrew Jackson, to the Chickasaws at Franklin, Tennessee, on August 23, 1830, that "The United States would give them a grant for lands which should endure as long as the grass grows and the water runs" and "within your limits no State or Territorial authority will be permitted;" the assurance that Secretary Eaton and General Coffee gave to the

Choctaws at Dancing Rabbit Creek in Mississippi on September 18, 1830, that "there your great Father can be your friend; and he can keep the white man's law from interrupting and disturbing you; and there, too, he will guard you against all enemies whether they be white or red. There no State or Territory will be created;" and the solemn declaration of the United States in Article IV of the Treaty of September 28, 1830, "That no part of the lands granted to them shall ever be embraced in any territory or State" leaves no room for it to be said that when the United States signed the treaties with the Choctaws it intended that the lands conveyed to the Choctaws would be embraced in a state or that it intended to reserve the soil and the minerals under the bed of the navigable portion of the Arkansas for the benefit of a future state.

The decisions of the Supreme Court of Oklahoma in *State* v. *Nolegs* and *Vickery* v. *Yahola Sand and Gravel Company*, and of the court below, from which this appeal is taken, are all bottomed upon the premise that, notwithstanding the solemn representations that the United States made to the Choctaws to induce them to exchange their home lands east of the Mississippi for the wild lands in the west, it was the intention of the United States to later embrace the area ceded to the Choctaws within a state and that intention was known and acceded to by the Choctaws. This was not so.

In construing a treaty all provisions relevant to the matter under deliberation must be considered. A treaty should be construed in the light of the circumstances existing at the time it was entered into and the objects that the parties were desirous of effecting.

If the representations and promises made by the United States to the Choctaws, that the area ceded to them would never be embraced within a future state, induced the Choctaws to sign the treaties at Doak's Stand and at Dancing Rabbit Creek, and if the meeting of the minds of the negotiating parties on that issue is reflected by Article IV of the Treaty at Dancing Rabbit Creek, then the premise upon which *State* v. *Nolegs* and *Vickery* v. *Yahola Sand and* Gravel Company is bottomed, is false.

Under this Court's decisions in *Choctaw Nation* v. *United States, Jones* v. *Meehan,* and *Choctaw Nation of Indians* v. *United States,* and the specific provision of Article XVIII, the Treaty at Dancing Rabbit Creek must be construed most favorably to the Choctaws. When this is done and that treaty is viewed against the background of the objects that the Government was desiring to effect by it and of the circumstances existing at the time it was entered into, it is obvious that the Government had no need to retain anything but a navigation easement on the streams in the lands ceded to the Choctaws.

Respectfully submitted,

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